

JUN 1 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 78-1273

MILDRED POPKIN,

Petitioner,

against

NEW YORK STATE HEALTH AND MENTAL HYGIENE FACILITIES
IMPROVEMENT CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent opposes the petition for a writ of certiorari to review an order and decision of the United States Court of Appeals for the Second Circuit, dated December 15, 1976 which affirmed the decision of the United States District Court for the Southern District of New York dismissing petitioner's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Opinion Below

The opinion of the Court of Appeals which has not been reported is reproduced in petitioner's Appendix A, p. A-1.

The opinion of the District Court for the Southern District of New York is reported at 409 F. Supp. 430 and is reproduced in petitioner's Appendix as Appendix B, p. A-8.

Jurisdiction

The judgment of the Court of Appeals was entered on December 15, 1976. Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

Question Presented

Has petitioner presented any factor which would motivate the exercise of this Court's certiorari jurisdiction?

Statement of the Case

Petitioner claimed that the respondent New York State Health and Mental Hygiene Facilities Improvement Corporation, a State public benefit corporation (McKinney's Unconsolidated Laws, Title 13-A § 4404) discriminated against her on the basis of sex. In January, 1968, petitioner was hired by the respondent as an Associate Development Administrator. On or about November 15, 1970, petitioner (as well as two male architects) was informed that her services would be terminated as of January 15, 1971 because of a diminished workload. Petitioner instituted an action in the United States District Court under the Equal Employment Opportunities Act, Title VII of the Civil Rights Act, 42 USCA §§ 2000e, *et seq.*, alleging that this termination was an act of discrimination based on her sex and, as such, was prohibited by Title VII. Petitioner requested \$54,490.93 in damages from loss of wages, \$100,000 in punitive damages and \$25,000 for legal fees.

The District Court dismissed petitioner's complaint and found that the respondent was a "political subdivision" within the meaning of Title VII. The Court further found that in the instant case the 1972 Amendment to Title VII was not retroactive. The Court of Appeals affirmed the District Court's decision stating that the respondent despite its designation of "public benefit corporation" was a political subdivision within the act and was exempt prior to the 1972 Amendment to Title VII. The Court also ruled that the Amendment had no retroactive effect where it created a new substantive right as in the case at bar. Petitioner seeks to review these decisions.

Reasons for Denying the Petition for Certiorari

Petitioner has failed to present any factor which would motivate the exercise of this Court's jurisdiction

Petitioner seeks to have this Court grant a writ of certiorari to review issues which were never raised in the Court of Appeals and thus never ruled on by the Courts. For the first time in the case at bar, petitioner claims that where an administrative proceeding under Title VII was pending at the time the 1972 Amendment became effective, the Amendment can be applied retroactively to cover such a case. This issue was never raised in the Court of Appeals and never ruled on by that Court. Thus, this claim is not properly before this Court. *United States v. DiRe*, 332 U.S. 581, 588 (1948).

Moreover, since the Court of Appeals never ruled on petitioner's new claim, such a claim cannot possibly be the basis of a conflict of the Second Circuit's decision with those of this Court or other Circuits.

Rather, it is clear from petitioner's brief to the Second Circuit that her sole claim was that the respondent as a

public benefit corporation was not a political subdivision and thus was not exempt as such. Nowhere did petitioner raise the claim that since her administrative proceeding was pending at the time the Amendment was passed, the Amendment is retroactive as to her. In fact the issue of retroactivity was not raised in any form in petitioner's brief.

Further, the only mention of retroactivity was in petitioner's District Court memorandum. There petitioner admitted that the Court of Appeals decision in *Brown v. General Services Administration*, 425 U.S. 820 (1976) was distinguishable from the case at bar but stated that, aside from the fact that the defendant here was not a political subdivision, the Courts were careful to expand, not limit a plaintiff's right to redress (Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss, p. 5) and thus if the 1972 Amendment applied, it should be applied retroactively.

Indeed, a review of the Court of Appeals' decision in *Brown* clearly reveals that it in no way conflicts with the decision of the Second Circuit in the case at bar. In *Brown*, the precise issue of whether a plaintiff could benefit from a retroactive application of the 1972 Amendment to Title VII, where the claim was pending in administrative proceedings at the time the Amendment was passed, was raised to the Court. In the case at bar, such claim was not. Moreover, in *Brown*, the Court was determining the rights of federal employees and the concomitant federal statutes involving such employees. Rather, the instant case involved state employees, a clearly viable distinction.

Likewise, the other two most important Circuit cases which purportedly conflict with the case at bar, *Place v. Weinberger*, 497 F. 2d 412 (6th Cir. 1974), cert. granted vacated and remanded — U.S. —, 96 S. Ct. 2643 (1976) and *Koger v. Ball*, 497 F. 2d 702 (4th Cir. 1974) are distinguishable on the same basis as the lower court decision

in *Brown*. A review of the decisions of the above cases reveals that the Courts found that federal employees had a substantive right to be free from discrimination, prior to the 1972 Amendment. The Courts based such a right in Executive Order 11478 and the President's directives to the Civil Service Commission. See *Koger v. Ball* at 704. These regulations clearly apply only to federal employees and not to state employees.

More importantly, the decisions of this Court likewise do not conflict with that of the Second Circuit in the case at bar. In *Brown*, this Court did not rule on the issue of whether the 1972 Amendment could be applied retroactively to proceedings pending at the time of passage. As petitioner admits, the Court noted that the parties did not question the holding of retroactivity by the Court of Appeals and thus the Court had no occasion to disturb it. This doctrine clearly does not establish a conflict with the holding of the Court of Appeals in the instant case. Further, this Court's remand in *Place v. Weinberger*, *supra* does not create a conflict between the decisions since as noted earlier the cases are distinguishable.

Finally, a review of the Second Circuit's opinion in the case at bar reveals that its discussion of the retroactivity of the 1972 Amendment did not conflict with any of the cases cited by petitioner. The Court of Appeals quoting its earlier decision in *Weise v. Syracuse University*, 552 F. 2d 397 (2d Cir., 1975) stated that the 1972 Amendment to Title VII has no retroactive effect where new substantive rights are created. The Court further distinguished the Circuit Court's opinion in *Brown* citing *Monell v. Department of Social Services*, 532 F. 2d 259 (1976), petition for certiorari filed, 45 USLW 3090, stating that Title VII had included a specific proviso stating that the policy of the United States was to insure equal employment opportunity for federal employees and directing the President to utilize his authority in effecting such policy. Section 717 was viewed therefore as merely a procedural section

in regard to federal employees since it created no new substantive rights. The Court stated that no such proviso had been made for State employees and thus petitioner had no substantive rights under Title VII before the 1972 Amendment.

In the case at bar, the Court also noted at page 996, fn. 5 that appellant had failed to raise any Fourteenth Amendment claim in the instant case and thus the Court did not reach that issue. Nowhere in its decision, did the Court of Appeals rule on or even discuss the question of retroactivity of the 1972 Amendment in cases where an administrative proceeding was pending at the time of its passage.

CONCLUSION

Respondent's petition for a writ of certiorari should be denied.

Dated: New York, New York
May 27, 1977

Respectfully submitted,

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